



# Legal Document

---

Superior Court of California, County of San Francisco  
Case No. CGC 00 310481

**Carolina Casualty Vs The Scott Companies**

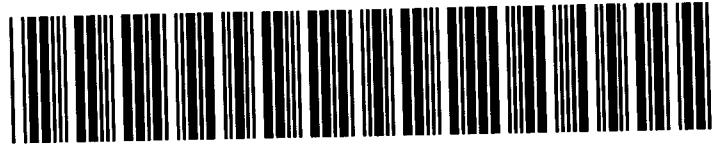
Document 73



[View Document](#)



[View Docket](#)



San Francisco Superior Courts  
Information Technology Group

## Document Scanning Lead Sheet

Sep-21-2004 8:39 am

Case Number: CGC-00-310481

Filing Date: Sep-16-2004 8:35

Juke Box: 001 Image: 01043324

CROSS COMPLAINT

CAROLINA CASUALTY VS THE SCOTT COMPANIES

001C01043324

**Instructions:**

Please place this sheet on top of the document to be scanned.

1 STEPHEN L. PORTER – SBN 67177  
2 DENNIS P. SCOTT – SBN 139725  
3 WHITEHEAD, PORTER & GORDON LLP  
4 220 Montgomery Street, Suite 1850  
5 San Francisco, CA 94104  
6 Telephone: (415) 781-6070  
7 Facsimile: (415) 788-6521

5 Attorneys for Defendants and Cross-Complainants  
6 The Scott Companies, Inc., Scott Company of California, Scott-  
Norman Mechanical, Inc., Joseph Guglielmo, Robert Nurisso,  
Richard Davis

7

8 SUPERIOR COURT OF CALIFORNIA – UNLIMITED JURISDICTION

9

## CITY AND COUNTY OF SAN FRANCISCO

10 | CAROLINA CASUALTY COMPANY,

) Case No. CGC-00-310481

11 Plaintiff,

) ) **CROSS-COMPLAINT FOR BREACH  
 ) OF CONTRACT AND BREACH OF  
 ) THE COVENANT OF GOOD FAITH  
 ) AND FAIR DEALING**

13 THE SCOTT COMPANIES, INC., SCOTT  
14 COMPANY OF CALIFORNIA, NORMAN  
15 PLUMBING, INC., SCOTT-NORMAN  
16 MECHANICAL, INC., ALVIN NORMAN  
AND JACQUELINE NORMAN, JOSEPH  
GUGLIELMO, ROBERT NURISSO,  
RICHARD DAVIS, and ROES 1-100,

## Defendants.

18 THE SCOTT COMPANIES, INC., SCOTT  
19 COMPANY OF CALIFORNIA, SCOTT-  
20 NORMAN MECHANICAL, INC., JOSEPH  
GUGLIELMO, ROBERT NURISSO and  
RICHARD DAVIS.

### Cross-Complainants,

-- | VS.

**Cross-Defendant.**

27 Cross-complainants The Scott Companies, Inc., Scott Company of California, Scott-

1 Norman Mechanical, Inc., Joseph Guglielmo, Robert Nuriuso and Richard Davis allege:

2       1. Cross-complainants The Scott Companies ("TSC"), Scott Company of California  
3 ("SCOC") and Scott-Norman Mechanical Inc. ("SNMI") are each California corporations duly  
4 licensed to do business in this state. SNMI is a wholly-owned subsidiary of SCOC, and SCOC is  
5 a wholly-owned subsidiary of TSC. Cross-complainants Joseph Guglielmo, Robert Nuriuso and  
6 Richard Davis are each residents of California; said individual cross-complainants are currently,  
7 or were formerly, officers and directors of TSC and SCOC; Nuriuso and Davis were former  
8 officers and directors of SNMI.

9       2. Cross-defendant Carolina Casualty Company ("Carolina") is an insurer authorized to  
10 issue policies of directors and officer's liability insurance in California.

11       3. Carolina issued a Directors' and Officers' Liability Insurance Policy to TSC for a  
12 policy period from July 17, 1998 to May 1, 1999, policy no. 1227844; said policy insured the  
13 individual cross-defendants as officers and directors of TSC and SCOC. Thereafter, Carolina  
14 issued a second Directors' and Officers' Insurance Policy to TSC for a policy period from May  
15 1, 1999 to May 1, 2000, policy no. 1239412; said policy insured the individual cross-defendants  
16 as officers and directors of TSC and SCOC. (The 1998-1999 policy and the 1999-2000 policies  
17 shall be referred to hereinafter as the "First Policy" and "Second Policy," respectively, or  
18 together as the "Policies"; the individual cross-defendants who were directors and officers of  
19 TSC and SCOC shall be referred to hereinafter as the "Insureds.") Cross-claimants are informed  
20 and believe that copies of said policies are attached to the Complaint in this action as Exhibits B  
and C, respectively.

21       4. Cross-complainants paid the premiums for the Policies and performed all other acts  
22 required under them, except to the extent excused or prevented by the acts and breaches of  
23 Carolina.

24       5. The Policies provided, *inter alia*, that in the event either a civil or criminal proceeding  
25 was filed against the Insureds during the term of the Policies, Carolina would pay any covered  
26 loss, as well as the costs of defending such proceedings.

27       6. On September 21, 1999, a civil action was filed against the Insureds, entitled *City and*

1       *County of San Francisco, et. al. v. Scott Company of California, et. al.* (said action was filed in  
2       San Francisco Superior Court but was later transferred to Santa Clara County Superior Court, as  
3       action no. CV 787323; hereinafter the "Civil Action"). The Civil Action alleged claims within  
4       the coverage of the Second Policy. Cross-claimants tendered the Civil Action to Carolina on or  
5       about September 30, 1999.

6       7. Cross-claimants are informed and believe, and thereupon allege, that Carolina failed  
7       to conduct a prompt full and complete investigation of the facts and circumstance giving rise to  
8       the Civil Action and, subsequently, denied the tender of defense.

9       8. Cross-complainants are informed and believe and thereupon allege that Carolina  
10      failed and refused to:

- 11       a. Conduct a prompt, full and complete investigation of the Civil Action in  
12            addition to matters which were alleged in the pleadings therein;
- 13       b. Defend the insureds, the individual cross-complainants herein, from the  
14            claims asserted in the Civil Action,
- 15       c. Advance the costs of defense for the insureds pending the final disposition of  
16            the Civil Action,
- 17       d. Indemnify the insureds from the claims asserted in the Civil Action,
- 18       e. Conduct any investigation, or a prompt, full and complete investigation, after  
19            rejecting the tender of defense and after cross-complainants advised Carolina  
20            that it had failed to conduct a proper investigation into the circumstances  
21            surrounding the claims asserted in the Civil Action;
- 22       f. Promptly respond to communications with respect to the claim; and
- 23       g. Continue to investigate the claims asserted in the Civil Action and reconsider  
24            the denial of the tender of defense during the course of the Civil Action.

25       9. Further, on March 8, 2000 Carolina filed the present action and rescinded the  
26       Policies.

27       10. On April 27, 2000 the individual cross-complainants and other parties were indicted  
28       by a federal grand jury in a case entitled *United States v. Guglielmo, et al.*, United States District

1 Court for the Northern District of California, no. CR 00-0232-MMC (the "Criminal Action").  
2 The Criminal Action alleged claims within the coverage of the Second Policy, most of which  
3 claims were based upon the same underlying facts and circumstances as those alleged in the  
4 Civil Action.

5 11. In filing this action, Carolina sought to litigate its claims, including for declaratory  
6 relief and rescission, notwithstanding the pendency of the Civil Action and the Criminal Action,  
7 even though the basis upon which it sought to rescind the Policies and deny coverage involved  
8 the same evidence and issues as were being litigated in the Civil Action and the Criminal Action;  
9 furthermore, even though cross-complainants obtained a stay of this action in order to protect  
10 their ability to defend themselves in the Civil Action and the Criminal Action, Carolina objected  
11 to the stay and tried to vacate it during the pendency of the Civil Action and the Criminal Action.  
12 Cross-complainants are informed and believe that in doing the foregoing, Carolina knew that the  
13 prosecution of this action during the pendency of the Civil Action and the Criminal Action  
14 would interfere with and harm the defense of the Civil Action and the Criminal Action by cross-  
15 complainants, and Carolina sought to prosecute this action to force the cross-complainants to  
16 lose their rights under the Policies.

17 12. Had Carolina conducted a reasonable investigation, it would have learned, *inter alia*,  
18 the following facts:

- 19 a. The claims alleged in the Civil Action were without merit,
- 20 b. The claims alleged in the Criminal Action were without merit as to cross-  
21 complainants Guglielmo and Davis and were in large part without merit as to  
22 cross-complainant Nurisso;
- 23 c. There was a potential for liability under the Second Policy for a covered loss  
24 in both the Civil Action and the Criminal Action; and
- 25 d. The individual cross-complainants were entitled to a defense by Carolina in  
the Civil Action and the Criminal Action.

26 13. As a result of Carolina's rescission of the Policies, cross-complainants were  
27 prevented from tendering the defense of the Criminal Action; further, any tender would have

1 been futile in light of Carolina's prior rescission of the Policies and its refusal to accept the  
2 tender of defense of the Civil Action.

3       14. As a result of Carolina's rescission of the Policies and refusal to defend cross-  
4 complainants, cross-complainants were compelled to retain counsel at their own expense and to  
5 settle the Criminal Action, part of which settlement constituted a covered loss. Cross-  
6 complainants were also compelled by the aforesaid conduct of Carolina to hire counsel to defend  
7 this action and prosecute this cross-complaint in order to receive their benefits under the Second  
8 Policy and avoid rescission of the Policies. The expenditures by cross-complainants for defense  
9 costs of the Civil Action and the Criminal Action and the settlement of the Criminal Action were  
within the jurisdiction of this Court.

## **FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

11 15. Cross-complainants hereby incorporate by reference each and every allegation  
12 contained in paragraphs 1 through 14 above.

16. The aforesaid acts, refusals and failures of Carolina breached the Policies.

14        17. As a result of Carolina's failure and refusal to conduct a full and complete  
15 investigation, Carolina is estopped from relying upon any subsequently-discovered information  
16 to support its rejection of cross-complainant's tender of defense in the Civil Action; as a result of  
17 Carolina's rescission of the Policies it is estopped from relying upon any subsequently-  
18 discovered information to support rejection of its obligations to defend the Criminal Action and  
19 to indemnify cross-complainants for the covered portion of the settlement in that action.

18. As a result of Carolina's failure and refusal to conduct a full and complete investigation, Carolina waived any obligation on the part of cross-complainants to cooperate with the insurer in the defense of the Civil Action or the Criminal Action.

23 19. As a direct and proximate result of the breach by Carolina of its obligations under the  
24 Policies, cross-complainants have been damaged as follows:

25 a. Cross-complainants were compelled to retain attorneys to defend the Civil  
26 Action and the Criminal Action and to pay their fees and costs in an amount to  
27 be proved at trial,

- b. Cross-complainants were compelled to enter a settlement of the Criminal Action in an amount to be proved at trial, and
- c. Cross-complainants incurred general damages in an amount to be proved at trial.

**SECOND CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH  
AND FAIR DEALING**

20. Cross-complainants hereby incorporate by reference each and every allegation contained in paragraphs 1 through 19 above.

21. The aforesaid acts, refusals and failures of Carolina breached the implied covenant of good faith and fair dealing arising out of the Second Policy, including in the following respects:

- a. Carolina unreasonably, and without proper cause failed and refused to conduct a reasonable investigation into the facts and circumstances which gave rise to the Civil Action,
- b. Carolina tried to rescind the Policies by adopting pre-textual and other invalid grounds for rescission, in order to avoid its obligations to cross-complainants under the Policies,
- c. Carolina unreasonably and improperly interpreted the policy applications and the Policies in a manner calculated to deny cross-complainants the policy benefits,
- d. Carolina unreasonably refused to pay for the defense of the Civil Action and rescinded the Policies on unreasonable grounds in order to avoid paying for the defense of the Criminal Action, and
- e. Carolina rescinded the Policies on unreasonably grounds in order to avoid paying for part of the settlement of the Criminal Action.

22. The denial of benefits claimed by cross-complainants under the Policies was done by Carolina without reasonable cause. Carolina knew that a duty to defend was owed cross-complainants in the Civil Action and knew that it was possible that the Criminal Action might be filed, for which a defense was also owed; nevertheless, Carolina refused to provide a

1 defense to the Civil Action and rescinded the Policies in order to avoid defending the potential  
2 Criminal Action. Carolina filed this action and sought to prosecute it, furthermore, for the  
3 purpose and with the intent of undermining cross-complainants' defenses to the Civil Action and  
4 the Criminal Action, by forcing cross-complainants to abandon their rights under the Policies in  
5 order to defend their interests in the Civil Action and the Criminal Action.

7  
8 a. Attorney's fees and expenses incurred in defending the Civil Action and the  
9 Criminal Action,  
10 b. A portion of the settlement in the Criminal Action, and  
c. General damages.

11       24. Cross-complainants are informed and believe, and thereupon allege, that in doing  
12 the foregoing, Carolina intentionally engaged in a course of conduct which was intended to  
13 perpetrate a fraud upon and oppress cross-complainants and dissuade them from seeking the  
14 benefits due them under the Policies. Moreover, the aforesaid conduct of Carolina was  
15 undertaken with a conscious disregard of the rights of cross-complainants to receive the benefits  
16 under the Policies. Said conduct by Carolina continued even after cross-complainants objected  
17 and advised Carolina of its wrongful conduct. As a result, cross-complainants are entitled to  
18 recover punitive damages against Carolina.

## PRAYER

20 Wherefore, cross-complainants pray:

21       1. For damages according to proof, including the costs of defense of the Civil Action  
22 and the Criminal Action and a portion of the settlement paid in the Criminal Action, all in an  
23 amount within the jurisdiction of this Court,

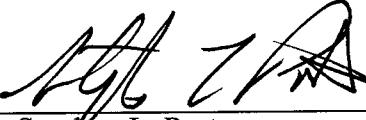
24 2. For general and compensatory damages according to proof;

25       3. For attorney's fees incurred in bringing this action to recover the benefits of the  
26 Second Policy, as provided by law,

1           4. For punitive damages in an amount sufficient to deter and make an example of  
2 Carolina,  
3           5. For prejudgment interest in an amount to be proved at trial,  
4           6. For costs of suit herein, and  
5           7. For such other and further relief as the court may deem proper and just in the  
6 circumstances.

7 Dated: Sept. 15, 2004

WHITEHEAD, PORTER & GORDON LLP

8 By:   
9 Stephen L. Porter

10 Attorneys for Defendants and Cross-Complainants  
11 The Scott Companies, Inc., Scott Company of  
12 California, Scott-Norman Mechanical, Inc.,  
13 Joseph Guglielmo, Robert Nurisso, Richard Davis